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No. 90-584

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

THE IMPORTANCE OF THIS CASE IS NOT IN DISPUTE

In his Brief in Opposition to Petition for Writ of Certiorari, Respondent only makes substantive arguments as to why the decision of the Ninth Circuit is correct.[1] He fails to address any of Petitioner's arguments with respect to the importance of the issues presented in the petition.

Presumably, that is because *there is no argument* with respect to the importance of the issues presented by Southwest Marine's petition or with respect to the uncertainty of the law in that area, including the divergence between the circuits and even between panels of the same circuit. Furthermore, it is notable that Respondent makes no attempt to deny that the Ninth Circuit's

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[1]Petitioner does not concede the merits of Respondent's substantive arguments. However, they will be addressed in Petitioner's brief on the merits, should the Court grant certiorari.

decision in this matter will have a devastating effect on the shipbuilding and repair industry, its employees, and the courts.

THE DECISION OF THE NINTH CIRCUIT AND THE SUBSTANTIVE ARGUMENTS PRESENTED BY RESPONDENT FLY IN THE FACE OF CONGRESSIONAL INTENT

The decision of the Ninth Circuit and Respondent's arguments in opposition to Southwest Marine's Petition for Writ of Certiorari are inconsistent with the intent of Congress in enacting both the LHWCA and the Jones Act. The legislative history behind the Jones Act suggests that Congress intended that Jones Act remedies be limited to those workers whose jobs entail the particular hardships experienced by those who work at sea.[2]

One of the prime purposes of the LHWCA is to provide a prompt and expeditious remedy for work-related injuries to those maritime workers thought by Congress to work in an area in which neither the Jones Act or state workers' compensation acts provide coverage.[3] Congress' intent was *not* that employees be covered under both the Jones Act and the LHWCA.[4]

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[2]*See*, H.R. Rep. No. 639, 67th Cong., 2d Sess. 9 (1922); S. Rep. No. 94, 67th Cong., 1st Sess. 1 (1921); 62 Cong. Rec. 7754 (1922). In fact, as discussed in depth in Southwest Marine's petition, Congress' intent behind the 1972 Amendments to the Longshore Act, which abolished civil actions for unseaworthiness, was that land-based maritime workers be treated the same as other land-based workers. *See*, Petition for Writ of Certiorari, p. 8.

[3]*Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[4]*See, e.g., South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940); *Thibodeaux v. Torch, Inc.*, 858 F.2d 1048, 1050 (5th Cir. 1988); *Pizzitola v. Electric Coal Transfer Corporation*, 812 F.2d 977, 983 (5th Cir. 1987), *cert. denied*, (continued...)

However, the decision of the Ninth Circuit encourages employees to pursue claims under the LHWCA and the Jones Act. That not only encourages litigation, it also encourages employers to controvert Longshore compensation to their employees in order to avoid providing double payments or recovery. The net effect is that land-based employees would lose their Longshore compensation benefits (when they need it most) and would be pushed toward a negligence-based system in which they must prove liability (the Jones Act). That is also contrary to the intent of Congress that the greatest number of employees have access to a system which provides prompt and voluntary compensation and medical treatment to employees for work-related injuries.

The decision of the Ninth Circuit and the uncertain state of the law have also, in effect, created a new remedial system not contemplated by Congress. That system is for land-based workers who fall through the crack left open by the decision of the Ninth Circuit and the uncertain state of the law in that area. Those workers would obtain generous LHWCA payments as a result of a work-related injury and continue to receive those benefits while litigating their Jones Act claims. Those workers thus enjoy both the security of a no-fault compensation system as well as seamen's remedies not available to their fellow land-based workers.[5]

RESPONDENT'S CONTENTION THAT IF GIZONI WAS FOUND TO BE A "SEAMAN" HE WOULD BE INELIGIBLE FOR LONGSHORE ACT BENEFITS IS DISINGENUOUS

Respondent argues that pursuit of his Jones Act claim does not violate the exclusive remedy provisions of the LHWCA because he

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[4](...continued)
484 U.S. 1059 (1988); *Baker v. Pacific Far East Lines, Inc.*, 451 F.Supp. 84, 89 (N.D. Cal. 1978).

[5]Bull, *Seaman Status Applied: A Practical Guide to Status Determination*, 1 U.S.F. Maritime Law Journal 43, 115 (1989).

has not been found to be a harbor worker by a trier-of-fact. However, that argument is disingenuous at best.

The gravamen of Southwest Marine's Petition is that the test for determining seaman's status is uncertain and places a tremendous strain on the shipbuilding and ship repair industries, as well as the judicial system.[6] Respondent begs the question when he asserts that is not a problem because at some point status will be determined.[7] Due to the uncertain state of the law, judicial and other resources are wasted before that determination is made.[8]

Moreover, Respondent's argument ignores the fact that the test for seaman status under the Jones Act can be and is different from the test for determining a member of crew of a vessel under the LHWCA.[9] Since the tests used in different forums are different, an employee can be covered by either the Jones Act or the LHWCA, or both Acts.

Furthermore, the federal circuits apply different tests for determining seaman status.[10] Different panels of the same circuit

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[6]*See*, Petition for Writ of Certiorari, pp. 10, 11.

[7]Respondent apparently is not concerned about the additional strain which addressing those claims would place on the judicial system.

[8]This case is a perfect illustration. Gizoni *filed for and received* LHWCA benefits. Thereafter, he pursued his Jones Act claim by suit in District Court.

[9]*See*, Petition for Writ of Certiorari, p. 18.

[10]As noted in Petitioner's Petition, the First, Fifth and Eighth Circuits apply a *version* of the "special purpose test". However, the Second, Third, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits follow a *version* of the "aid in navigation test." *See*, Petition for Writ of Certiorari, pp. 17-19.

may even apply different tests for seaman status.[11] In California, the federal courts and the state courts also apply different tests.[12] There simply is not a uniform standard and, therefore, the employee's status is never clear.

Significantly, under the Federal Employers' Liability Act,[13] a negligence based system for railway employees similar to the Jones Act, the test for status is clear and is the same test endorsed by Southwest Marine. The FELA is applicable to railway laborers' duties in both intrastate and interstate commerce, if significantly related to the latter.[14]

The FELA overlaps with the LHWCA at the point where the tracks meet the shore, similar to the Jones Act's intersection with the LHWCA where the ship meets the shore. The test for FELA coverage is that if an injury is covered under the LHWCA, the LHWCA is the railway employee's *exclusive* remedy and any action under FELA is barred.[15] Thus, the Supreme Court has clearly rejected any concurrent jurisdiction between the FELA and LHWCA. Rather, there is an "occupational test" -- if covered by the LHWCA, there is no FELA remedy -- that is consistent with

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[11]*Compare*, *Pizzitola*, *supra*, 812 F.2d at 977 with *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[12]*See*, *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983); *Baker*, *supra*, 451 F.Supp. at 87; *Soucie v. Tratwein Brothers*, 275 Cal. App. 2d 20, 25 (1969).

[13]Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*

[14]*Copley v. I.A.C.*, 19 Cal. 2d 287, 288 (1942), *cert. denied*, 316 U.S. 678 (1942).

[15]*Chesapeake & Ohio Railway Company v. Schwab*, ___ U.S. ___, 110 S.Ct. 381 (1987); *Kelly v. Pittsburgh & Connecticut Dock Co.*, 900 F.2d 89, 93 (6th Cir. 1980).

Pizzitola v. Electric Coal Transfer Corporation[16] and recent rulings of the Court.[17]

Despite Respondent's assertion, the same clarity is not to be found in the interrelation between the Jones Act and LHWCA. Because of the similarity between the FELA and the Jones Act,[18] the same type of occupational test used for FELA claims should be applied to Jones Act claims. If an employee is in an occupation covered by the LHWCA, he is not allowed to proceed with a FELA claim. He should also not be allowed to proceed with a Jones Act claim. Any other resolution encourages litigation, depletion of judicial resources, and continued uncertainty and disagreement among the circuits.

CONCLUSION

Respondent contends that Petitioner seeks a scenario in which seamen would lose their Jones Act rights. That is incorrect. Petitioner suggests that the distinction between seamen and longshore employees should be clear and unambiguous. It is for that reason that Petitioner asks the Court to enunciate a standard under which the maritime industry, maritime employees and the courts can determine whether a particular worker is a maritime

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[16]*Pizzitola, supra*, 812 F.2d at 977.

[17]*Chesapeake & Ohio Railing Co. v. Schwab*, ___ U.S. ___, 110 S. Ct. 381 (1989); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Pennsylvania Railroad Company v. O'Roarke*, 344 U.S. 334 (1953).

[18]Indeed, the Jones Act simply extends to seamen the remedies made available to railroad workers under FELA. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960).

employee subject to the provisions of the LHWCA *or* a seaman subject to the provisions of the Jones Act.

Petitioner requests that the Court grant certiorari.

Respectfully submitted,

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